1990

Dolly Plumb v. State of Utah : Reply Brief

Utah Supreme Court

Craig G. Adamson; Dart, Adamson & Kasting; Stewart M. Hanson; Suitter, Axland, Armstrong and Hanson; Attorneys for Appellees.
Jackson Howard; Leslie W. Slaugh; Attorneys for Appellants.

BRIEF

IN THE SUPREME COURT

OF THE STATE OF UTAH

DOLLY PLUMB, et al.,	:	
Plaintiffs-Appellees,	:	Case No. 900012
vs.	:	
STATE OF UTAH, et al.,	:	
Defendants.	:	Oral Argument Priority No. 16
	:	
MALCOLM A. MISURACA; HALEY & STOLEBARGER; DOUGLAS B. PROVENCHER; and BEYERS, COSTIN & CASE,	:	
Appellants.	:	

REPLY BRIEF OF APPELLANTS

APPEAL FROM THE MEMORANDUM DECISION OF THE
THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY, UTAH,
THE HONORABLE DAVID S. YOUNG

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ATTORNEYS FOR APPELLEES

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Cases Cited:

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IN THE SUPREME COURT

OF THE STATE OF UTAH

DOLLY PLUMB, et al.,	:	
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vs.	:	
STATE OF UTAH, et al.,	:	
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	:	
MALCOLM A. MISURACA; HALEY & STOLEBARGER; DOUGLAS B. PROVENCHER; and BEYERS, COSTIN & CASE,	:	
Appellants.	:	

REPLY BRIEF OF APPELLANTS

ARGUMENT

POINT I

THIS COURT SHOULD ENTER AN ORDER APPROVING THE STIPULATION OF APRIL 16, 1990, AND DISMISSING THE APPEAL.

The appellees advance the argument that a settlement agreement reached by the parties to this appeal on April 16, 1990, moots the appeal. (Brief of Appellees, pp. 12-13.) The appellants agree that the parties reached a settlement agreement on April 16, 1990, a copy of which appears in the Addendum to Appellees' brief. Appellants also agree that this settlement agreement renders the appeal moot under Rule 37 of the Utah Rules of Appellate Procedure. Pursuant to Rule 37, this suggestion of mootness is presented to the Court with a request that the Court accept and approve the

settlement and direct the clerk to enter an order of dismissal of the appeal.

Appellants do not believe that it is just that they receive less than the $5,800,000.00 awarded as attorney fees by the December 6, 1988 Order of the trial court, together with all interest accrued thereon. Appellants believe that the results achieved, $44,000,000.00 for their clients, were beyond anyone's predictions. Nonetheless, the settlement agreement, which represents significant concessions by appellants, was reached as a result of long and arduous negotiation and appellants feel a moral and ethical commitment to be bound by the terms thereof.

Accordingly, the appellants join appellees in urging that the Court approve the settlement agreement and dismiss the appeal.

POINT II

THE LAW OF THE CASE DOCTRINE APPLIES TO THIS CASE.

Appellees argue that the law of the case doctrine does not apply to findings of fact, but only to conclusions of law. (Brief of Appellees, p, 9, n. 3.) Appellants agree that the classic definition of the doctrine has usually been expressed in terms of a legal decision at one stage of litigation binding future legal decisions in successive stages of the same litigation. The policy considerations behind this doctrine, however, apply with equal force to the "factual" determination made by the trial court. Where the trial court made factual findings in the December 5, 1988, Memorandum Decision, based solely on the record before it and

its own observations, and where no new evidence was presented thereafter to the contrary, it was error for the trial court to make different findings in the October 31, 1989, Memorandum Decision. Moreover, as appellees apparently agree, the trial court entered its conclusions of law in the December 5, 1988, Memorandum Decision, to the effect that reasonable and fair attorneys fees under the circumstances were $5,800,000.00, and it was error for the trial court to reverse its own legal decision in the subsequent October 31, 1989, Memorandum Decision.

Appellees also argue that the law of the case doctrine does not limit the power of the trial court to reconsider its interlocutory decisions. (Brief of Appellees, p. 9, n. 3.) Appellants cannot agree with this proposition. The Utah Court of Appeals has applied the law of the case doctrine to review of interlocutory orders. Salt Lake City Corp. v. James Constructors, Inc., 761 P.2d 42, 44-45 (Utah Ct. App. 1988).

Nothing changed in this case between December 5, 1988, and October 31, 1989, which would justify the trial court in changing its findings, conclusions and decision. Indeed, the only new evidence presented to the trial court after its original decision either supported the original fees or an increase in the fees not a reduction. (See, e.g., Affidavit of Sol Schreiber, attached hereto in the Addendum and hereby incorporated herein. Mr. Schreiber is a highly regarded, nationally prominent expert in the awarding of fees to class counsel in class actions, who has served as a Special Master in more proceedings than any other, including

In Re: Agent Orange. See also the proffer of Thomas T. Anderson, attached hereto in the Addendum and hereby incorporated herein. Mr. Anderson is a nationally known trial lawyer with extensive experience in class actions and contingent fee cases.) The trial court erred in reconsidering and modifying its decision.

CONCLUSION

The settlement agreement reached by the parties should be approved by this Court and the clerk should be directed to enter an Order of dismissal of the appeal. Alternatively, the Memorandum Decision of October 31, 1989, should be vacated, and the Memorandum Decision and Order of December 5 and December 6, 1988, should be reinstated.

DATED this 25th day of May, 1990.

Jackson Howard

JACKSON HOWARD and
LESLIE W. SLAUGH, for:
HOWARD, LEWIS & PETERSEN
Attorneys for Appellants

MAILING CERTIFICATE

I hereby certify that four true and correct copies of the foregoing were mailed to the following, postage prepaid, this 25th day of May, 1990.

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Reed M. Stringham III
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Sheila Bohard
D.O.I.T.
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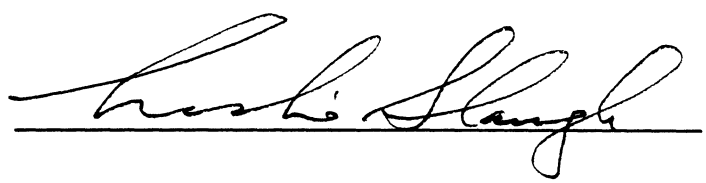

APPENDIX "A"

AFFIDAVIT IN SUPPORT OF FEE AWARDED
TO PLAINTIFFS' COUNSEL

(SOL SCHREIBER)

SOL SCHREIBER
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Specthrie & Lerach
One Pennsylvania Plaza
New York, New York 10119
(212) 594-5300

THIRD JUDICIAL DISTRICT COURT IN AND FOR SALT LAKE COUNTY

STATE OF UTAH

DOLLY PLUMB, et al.,	:	AFFIDAVIT IN SUPPORT OF FEE AWARDED TO PLAINTIFFS' COUNSEL
Plaintiffs,	:	
vs	:	
STATE OF UTAH, et al.,	:	Case No C87 4879
Defendants.	:	Judge David S. Young

SOL SCHREIBER, being duly sworn says.

I am an attorney licensed to practice in the courts of the State of New York. Attached to this affidavit is my curriculum vitae.

The counsel for the depositors in this action have asked me to review and render an opinion on the compensation awarded to them following their settlement with the State of Utah last year. They have also asked that I render an opinion on the methodology used by James U. Jensen, who is the Master appointed in this case, to review costs incurred by class counsel and Depositors of Insured Thrifts (DOIT), the non-profit corporation organized for the benefit of the Utah depositors in this action.

To accomplish this task I have reviewed a series of documents and other materials, including

1. Motion for Preliminary and Final Approval of Attorneys Fees and Costs

2. Supplemental Memorandum in Support of Attorneys Fees for Class Counsel.

3. Memorandum Decision of December 5, 1988.

4. Order of December 6, 1988

5. First Interim Report

6. Order of December 16, 1988

7. Third Interim Report.

After consideration of what I have seen and reviewed, and based on my experience as Master in a series of significant cases (listed in the attached curriculum vitae), as a former judicial officer (U.S. Magistrate, S.D.N.Y. 1971-78), as professor of law in complex litigation (Fordham University School of Law, 1972-86), and a teacher in the area of complex litigation and class actions in continuing legal education circles for more than twenty years, it is my considered opinion that:

1. The fee awarded to class counsel in this case of $5,800,000 is reasonable one, whether considered on a common fund basis, a lodestar approach, or a hybrid of the two. It is also significant that the fee falls at the minimum expressed in the 1987 fee agreement between class counsel and DOIT. The fee agreement was in itself, in my opinion, a reasonable and

careful effort to set forth parameters for compensating class counsel, subject to approval of the court, and it should be given considerable weight.

2. On a common fund basis, the fee awarded was 20% of $29,000,000. I understand class counsel voluntarily agreed not to seek a fee on the additional $15,000,000 recovered from the State of Utah. In my experience a fee of 20% in common fund cases is a reasonable one in light of the quality of work, the expertise required, the result obtained, and the other factors that illustrate the work that class counsel did for the depositors in this class action. Put another way, the opinion of the Master that one-third of the original fee award should be struck is completely meritless. It only stands to reason that counsel must be compensated reasonably and consistent with the job they have done. In my judgment, the Master does not begin with that approach. It appears the Master simply labels himself an advocate for putting as much money in the depositors' pockets as possible, disregarding the depositors' duty to pay a fair fee and costs associated with counsels' efforts in this litigation. The depositors are not well served by undercutting their counsel and service providers, either on a basis of simple equity or in looking forward to their further need for counsel and service providers in this action. The Master's approach is at best a short-sighted policy. The depositors recognize it as such, since they have filed their

own papers, prepared by their own special counsel, attacking the Master for paternalism in an effort to avoid their opinions.

3. On a lodestar basis, the fee to class counsel is quite reasonable. When the time spent by counsel implementing the settlement with the State is considered in addition to their earlier time, I understand that the multiplier here would be less than 3.00 to yield a fee of $5,300,000, which again is very reasonable. The depositors depend on class counsel under the Thrift Settlement Legislation of 1988 to carry on with their effort to recover the balance of principal and interest due to the depositors. This requires collaboration with the State and California Union Insurance Company. I believe this cannot be accomplished without satisfying the reasonable obligations of the depositors to their counsel and to the service providers they depend on to prepare their case. Simply to cut fees and costs is, in my opinion, a fundamental error and counterproductive.

4. In accord with Rule 53 of the Utah Rules of Civil Procedure, which is substantially identical to the federal rule, one should look to the court's orders of reference to determine the breadth of the Master's appointment. In the December 5, 1988 Memorandum Decision, the December 6, 1988, and the December 16, 1988 Order, the Master's scope of authority is limited to an examination of the propriety and accuracy of amounts claimed for costs incurred by various consultants and

expert witnesses in connection with the class action and a report to the court on the Master's findings in that regard. I do not believe the foregoing Memorandum Decision and Orders permit the Master to examine the issue of attorneys' fees for class counsel. Indeed, the court has issued its decision and final order on the matter of attorneys' fees. It seems clear, therefore, that there is no need, and the court had no intent, to refer the matter of attorneys' fees to the Master's attention. It is my considered opinion that in reviewing attorney's fees for class counsel the Master has addressed matters clearly outside the scope of his Rule 53 appointment. Thus, it is respectfully submitted that the recommendation of the Master on attorneys' fees for class counsel should thus be disregarded by the court.

5. With respect to the costs of prosecuting an important class action, I believe that the Master is misguided in his approach to the standards to be followed in reviewing costs. It is obvious that when a class action is over, one can minimize costs expended by class counsel. Experts are sometimes retained who prove in the last analysis to have been of limited value; or depositions may be taken that ultimately are never used; accountants may be hired to review the work of other auditors and find that they must trace many blind alleys before they discover the route to the result they need. The examples could be multiplied many times. Using only hindsight,

and not an analysis of the situation that faced counsel at the time, the Master appears to have critized and refused to permit the depositors to pay many of the costs of their highly successful suit against the State. It is more than a little ironic that class counsel, whose extraordinary success produced an early settlement from the State, find themselves criticized as though their efforts and the efforts of the service providers had instead produced a minimal or unsatisfactory outcome. With the extraordinary success in this case, which, I understand, the Court has more than once referred to as a "miracle", one would think that the Master would be equally complimentary of their effort. Instead, one can read the Master's report from one end to the other, only to find that he has filtered from the reports every basis on which the Court itself praised the work of counsel to an extraordinary extent.

As an example of the Master's errors in this regard is the manner in which he dealt with the costs of hiring Mr. Todd Conover and his firm, Edgar, Dunn & Conover. Mr. Conover was Comptroller of the Currency in the Reagan administration in the early 1980's. As such, he was a member of the board of the FDIC. I am advised that he participated in some of the largest bank insolvency proceedings in the history of the United States. He was eminently qualified to assist class counsel in explaining to the Utah Attorney General's office, members of the Utah Legislature, and the Governor and his staff

of the vagaries and ultimately fatal weaknesses of the Utah Private Deposit Insurance System. He appears to have done a reasonably good job, because it is my understanding that the Governor and Utah Legislature were sufficiently moved, by the depositors' early efforts, to appoint a Task Force to study the matter and to encourage the Governor to enter into immediate efforts leading to the ultimate settlement of the case. While one may be able to criticize an hour here or an hour there spent by Mr. Conover, or by class counsel in dealing with him, it is not possible in the uncertainty of a developing class action to be as efficient as one would like. The reasonable basis for judgment is to count results. In my opinion, class counsel did an extraordinary job in focusing at a very early date the willingness of the State of Utah to settle this case on its merits. I have not seen in the expenditures that they recommend to the depositors any sign or motivation of spending excess funds. On the contrary, I understand they counseled with DOIT many times to economize on expenditures and to make DOIT's money stretch to cover all of their needs.

A Master under Rule 53 is not an advocate for one side. He serves, in my judgment, in a judicial capacity - fully charged as any judge to be even-handed. In this case, it appears that, the Master has apparently failed to follow such a standard. Furthermore, it is my understanding that the Master in gathering evidence failed to follow the appropriate

procedures called for by Rule 53 He has held no hearings even after the matter has been brought to his attention. I have also been advised that the Master will not hold a scheduled hearing on Friday, July 7, despite all the objections to his prior failure to hold formal hearings, and that he expects instead to take only informal, oral, or written statements.

In summary, it is my opinion that from the date of his appointment, the Master went substantially beyond his appointment to review requested reimbursement costs, did not proceed with the proper even-handed judicial spirit, improperly considered himself to be the advocate for a cause, ignored the wishes of the very depositors he claimed to represent, and reached a flawed and incorrect result.

Dated: July 6, 1989.

Sol Schreiber

Subscribed and Sworn to before me this 6th day of July, 1989.

Notary Public
Residing in

MARILYN GELLER
Notary Public, State of New York
No. 01-4778808
Qualified in New York County
Commission Expires NOV. 30, 19 91

My Commission Expires:

Nov. 30, 1991

1698I

BIOGRAPHICAL SKETCH - SOL SCHREIBER

SOL SCHREIBER received a Bachelor of Arts degree, cum laude from City College of New York in 1952, and an LL.B from Yale Law School in 1955. Since February 1982, he has been a partner in the law firm of Milberg Weiss Bershad Specthrie & Lerach. He is admitted to the bar of the State of New York, to the United States District Court for the Southern and Eastern Districts of New York and to the Second Circuit Court of Appeals. Mr. Schreiber is a member of the American Bar Association, the New York State Bar Association, and Association of the Bar of the City of New York and has been elected to the American Law Institute.

In July 1985 Mr. Schreiber received the Francis Rawle Award, from the American Law Institute/American Bar Association's Committee on Continuing Professional Education, for his outstanding achievements in post-admission legal education.

In November, 1984, Mr. Schreiber received the Legal Aid Society's Presidential Award.

From 1971 through 1978, Mr. Schreiber served as a United States Magistrate in the United States District Court for the Southern District of New York where he conducted thousands of civil and criminal hearings and supervised pretrial procedures in many complex civil actions involving derivative, class, securities, accounting, antitrust, aviation, professional malpractice and products liabilty, including Berkey v. Kodak, Litton v. ATT, the Penn Central Commercial Paper Litigation, the Argo Merchant-Nantucket Stranding, and the Tenerife 747 Collision cases.

In March, 1974, upon appointment by the Chief Justice of the United States, he served as a Judicial Member, Anglo-American Exchange on Civil Procedure.

Mr. Schreiber has served, and is presently serving, as court-appointed Special Master in a series of complex federal cases, including the Agent Orange Litigation (J. Pratt & J. Weinstein, E.D.N.Y. 1982 -1984); the sex discrimination suit against the City University of New York (J. Gagliardi, S.D.N.Y. 1984 -); the Brooklyn Immigration Detention Center (J. Nickerson, E.D.N.Y. pro-bono, 1982-1984); The New York Times sex discrimination settlement (J. Wyatt, S.D.N.Y. pro-bono, 1978-1983); the MacMillan Publishing Co. sex discrimination suit (J. Lasker, S.D.N.Y. 1985 -); a cable-TV contract case - St. Charles Cable T.V. v. Eagle Comtronics (J. McMahon, S.D.N.Y. 1984-87); a libel case - Fleischer v. Fantagraphics (J. Broderick, S.D.N.Y. 1984-86); and an insurance coverage-attorney fee matter Yonkers Board of Education v. CNA & Continental Casualty Co. (C.J. Brieant, S.D.N.Y. 1987). Most recent Special Master assignments ave included an international antitrust case (J. Richey, D.D.C. 1986-1988; Hunt-short sale silver class action cases

and panelist on Prob. ms and Techniques in Civi RICO cases at the Federal Judicial Center s Workshop for Judges of the Second and Third Circuits - Saratoga Springs, New York He has also addressed the Ninth Circuit Judges Workshop in January, 1987, on Summary Judgment, Expert Testimony and Complex Litigation, and the Federal Judicial Center seiminars for U S Magistrates on Discovery Trends & Abuses' - June, July & August, 1989.

From November 1978 to February 1982, Mr Schreiber was President and Chief Executive Officer of a unit of the Federation of Jewish Philanthropies of New York which provided centralized legal, risk management and insurance services for the Federation's hospitals, homes for the aged, and health, education and community service agencies.

From 1955 to 1971 Mr. Schreiber was associated with Liberty Mutual Insurance Company as trial counsel in the federal and state courts in New York City He was Resident Counsel of their Brooklyn legal office from 1966-1971.

In the Fall, 1979, Mr. Schreiber served as the Hearing Officer for the New York State Energy Master Planning and Long-Range Electrical & Gas Planning.

An adjunct professor at Fordham Law School from 1972 - 1987, Mr. Schreiber conducted spring seminars on products liability, occupational disease and liability insurance litigation and trial advocacy.

Mr. Schreiber has been a participant in numerous special project committees for the American Bar Association and the Second Circuit, including service as the Reporter for the ABA Advocacy Task Force, which led to the formation of the National Institute for Trial Advocacy (1970-1971).

From 1973 to the present Mr. Schreiber has been the planning and program chairman of the ALI-ABA Continuing Professional Education national courses of study on federal evidence, civil practice and litigation in federal and state courts and has been a frequent lecturer at professional programs and workshops on federal civil procedure, trial evidence, product liability, occupational disease and liability insurance. Mr. Schreiber has edited and co-edited more than 40 works in these areas.

Additional and more detailed publications, bar association activities, and CLE programs include:

1. During his services as Special Master in the Agent Orange litigation, a number of Mr. Schreiber's written reports and recommendations, approved by the Court were officially published in: 96 F.R.D. 578; 582; 582-587; 587-593, 97 F.R.D. 424-427; 427-439, 98 F.R.D. 522-539; 539-548; 558-560, and 99 F.R.D. 338-339; 645-650

2 Professional Activities

1967-1975	ABA Judicial Administration Division, Member 1967-1975, Asst Secretary 1972-1975
1967-1973	Committee on Trial Practice and Technique for the Second Circuit, Member 1967-1973, Secretary 1967-1970
1980 1982	Member, Committees on Health Care and Civil Practice and Procedure of the ABA Antitrust Section
1970-1978	Joint Interprofessional Committee of Doctors and Lawyers of the First Department, New York, Member 1970-1978, Chairman 1975-1978
1964-1971	Member, A.A.A. National Panel of Arbitration
1965 to present	Association of the Bar of the City of New York
	Chairman, Medicine and Law Committee, 1965-1969
	Chairman, Special Committee on Human Experimentation, 1968-1970
	Member, Federal Courts Committee, 1976-1979
	Member, Committees on Products Liability (1979-1986), Science and Law (1985 - 1987)
1973-1977	Planning Staff, United States Magistrates' Seminar Programs at the Federal Judicial Center
1980-	Co-Chairperson, Legal Aid Society's Continuing Education Seminars on Complex Civil Litigation
1980-1982	Co-Chairman, New York State Bar Assn's. Multi-Site Seminar on New York and Federal Rules of Evidence and State Class Actions
1986-1987	Chairperson, Federal Asbestos Legislation Committee of the ABA Section of Tort & Insurance Practice
	Member, N.Y.State Bar - Association of the Bar of the City of New York - Joint Task Force on Liability Insurance Coverage

3. Continuing Legal Educational Programs

1960 to present — Developed and participated in the following education workshops and programs under the sponsorship of various organizations including the Practising Law Institute and the American Law Institute-American Bar Association Committee on Continuing Professional Education:

Trial Evidence
Courtroom Techniques
Federal Civil Practice and Litigation
Federal Criminal Practice and Procedure
Commercial and Corporate Litigation Problems
Class Actions under New Federal Rule 23
Products Liability
Medical and Professional Malpractice
Liability Insurance Litigation
Liability, Damages, and Medicine in Tort Cases
Current Problems in Federal Civil Practice
Practice under the New Federal Rules of Evidence
Civil Practice & Litigation in the Federal Courts
Hospital Liability
Section 1983 Civil Rights Litigation
Medical Products Liability and Preventive Law
Comprehensive Crime Control Act of 1984
Employment Discrimination and Civil Rights Actions in Federal Courts

4. Publications

Developed and edited or co-edited the following works:

Civil Practice & Litigation in the Federal Courts, ALI/ABA Continuing Legal Education course study materials (4th Ed., 3 vol., 2700 pp., August 1986).

Employment Discrimination and Civil Rights Actions in Federal Courts (ALI-ABA Course of Study Materials (3d. Ed. June 1987; approx. 635 pp.)

Recent Developments in Section 1983 Civil Rights Litigation, PLI Handbook (1984, 655 pp.)

Trial Evidence & Techniques in Federal & State Courts - A Clinical Study of Recent Developments, ALI-ABA, CLE Course Study Materials (revised for each of 30 programs, latest ed. October 1987, 660 pp.)

Suppl., 127 p.), ALI-ABA text

Liability Insurance Disputes, 1968, 800 pp., PLI text

Products Liability - Law, Practice, Science (co-edited with Paul Rheingold), 1967, 1200 pp., PLI text

Trial Evidence, 1967, 160 pp. (2d rev.ed.,ed., 1969), PLI text

Damages in Personal Injury Cases, 1965, 660 pp., PLI text

Medico-Legal Aspects of Bank Injury Cases, 1962, 710 pp., PLI text

Commercial and Corporate Litigation, 1968, 285 pp., PLI Handbook

New Federal Class Action Rule, 1968, 150 pp., PLI Handbook

Federal Criminal Practice and Procedure, 1968, 200 pp., PLI Handbook

Auto Insurance Problems, 1968, 455 pp., PLI Handbook

Professional Malpractice, 1967, 3 vols., 500 pp., PLI Handbook

Liability in Personal Injury Cases, 1966, 620 pp., PLI Handbook

Effective Personal Injury Practice, 1968, 640 pp., PLI Handbook

Personal Injury Medicine, 1965, 800 pp., PLI Handbook

ALI-ABA Courses of Study Chaired or Co-chaired by Sol Schreiber from 1973

1) "Trial Evidence and Techniques in Federal and State Courts: A Clinical Study of Recent Developments" (previously entitled, "Practice under the New Federal Rules of Evidence")

April, 1973	San Francisco
March, 1974	Los Angeles
December, 1974	New York City
February, 1975	Coronado, California
March, 1975	Wichita, Kansas
May, 1975	Columbia, South Carolina
June, 1975	Norman, Oklahoma
October, 1975	Washington, D. C.
November, 1975	Austin, Texas
December, 1975	St. Thomas, Virgin Islands
March, 1976	Albuquerque, New Mexico
June, 1976	Miami
October, 1976	Seattle
March, 1978	Atlanta
June, 1978	Villanova, Pennsylvania
October, 1978	St. Thomas, Virgin Islands
February 2, 1979	Los Angeles
June, 1979	Madison, Wisconsin
September, 1979	Charleston, South Carolina
February, 1980	Seattle
November, 1980	St. Thomas, Virgin Islands
September, 1981	New York City
February, 1982	San Francisco
September, 1982	Charleston, South Carolina
January, 1983	Los Angeles
September, 1983	San Antonio, Texas
December, 1983	Arlington, Virginia
August, 1984	Detroit
February, 1985	Scottsdale, Arizona
August, 1985	San Francisco
February, 1986	Hawaii
May, 1986	San Juan, Puerto Rico
July, 1986	San Francisco
November, 1986	Dallas
February, 1987	San Diego
July, 1987	Santa Fe
October, 1987	Charleston, S.C.
January, 1988	Orlando, FL
December, 1988	New Orleans, LA
February, 1989	Scottsdale, Arizona

2) Civil Practice and Litigation in Federal and State Courts"

November, 1979	San Juan, Puerto Rico
June, 1980	Villanova, Pennsylvania
January, 1981	New York City
April, 1981	Houston
November, 1981	San Juan, Puerto Rico
January, 1982	San Diego
June, 1982	New York City
March, 1983	New Orleans
March, 1984	Coronado, California
April, 1984	Charleston, South Carolina
November, 1984	Washington, D. C.
August, 1985	San Francisco
December, 1985	West Palm Beach
February, 1986	Hawaii
May, 1986	San Juan, Puerto Rico
July, 1986	San Francisco
November, 1986	Dallas
February, 1987	San Diego
July, 1987	San Francisco
October, 1987	Charleston, S.C.
January, 1988	Orlando, FL
July 11-13, 1988	Snowmass, Colorado
Dec. 2-3, 1988	New Orleans
Feb. 2-3, 1989	Scottsdale, AZ

3) Employment Discrimination & Civil Rights Actions in Federal Courts

April, 1986	Boston
December, 1986	Los Angeles
July, 1987	New York
August, 1988	San Francisco
July, 1989	Malibu, CA

4) "Medical Products Liability and Preventive Law," April 6 7, 1984, Philadelphia

5) "Class and Derivative Actions and Other Multiparty Complex Litigation Practical Problems and New Approaches, October 26-28, 1978, Washington, D.C.

6) Toxic Torts, Products Liability, Compensatory and Punitive Damages, Insurance Coverage Disputes, Legal Malpractice, Chapter 11 Bankruptcy Proceedings and Civil Litigation (July 14-16, 1988 - Snowmass, Colorado)

7) Self-Insurance Developments - Recent Legal, Regulatory and Commercial Trends Involving Foreign Domestic Captives, Risk Retention, Coverage - Reinsurance and Insolvency Disputes (Bermuda, March 9-11, 1989)

8) United States/Canadian Business Litigation Issues: A Comparative Study (Co-Sponsored by The Canadian Bar and The American Law Institute (Toronto, November 16-17, 1989)

Recent PLI Programs - Planning & Program Co-Chairman

1) New York and New Orleans (September October, 1984) Recent Developments in Section 1983 Civil Rights Litigation

2) New York, Chicago and Los Angeles (March, April, May, 1985) Comprenensive Crime Control Act of 1984

3) New York, San Francisco (March, April 1986) - Current Insurance Issues

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SPECIAL MASTER/MONITOR CASES OF SOL SCHREIBER

CASE NAME	YEARS	DOCKET NO.
GORDON v. HUNT Class Action - Short Sales - Silver Cases Settling Master	12/88 -	80 Civ. 5678 (S.D.N.Y.) J. Lasker
MEYER V. MACMILLAN Class Action - Employment Discrimination	3/85 -	78 Civ. 2133 (S.D.N.Y.) J. Lasker
MELANI v. BOARD OF EDUCATION Class Action Employment Discrimination	9/84 -	73 Civ. 5434 (S.D.N.Y.) J.Gagliardi
AGENT ORANGE Mass Tort Class Action Special Master	4/82 - 1/84	MDL 381 (E.D.N.Y.) J. Platt J.Weinstein
ST. CHARLES V. EAGLE COMTRONICS Contract Suit Special Master	11/84 - 3/87	83 Civ. 7126 (S.D.N.Y.) J.MacMahon
BROOKLYN IMMIGRATION DETENTION CENTER Pro-Bono Monitor Constitutional Rights	3/82 - 5/84	79 Civ. 0795 (E.D.N.Y.) J.Nickerson
YONKERS BD. OF ED. v CNA Counsel Fee Special Master	1/87 - 1/88	85 Civ. 8859 (S.D.N.Y.) C.J. Brieant
SOCIETE LIZ v. CHARLES OF RITZ International Antitrust Special Master	12/86 - 5/88	85 Civ. 1129 (D. D.C.) J. Richey
FLEISCHER v. FANTAGRAPHICS Libel Case Special Master	6/84 - 1/86	80 Civ. 5678 (S.D.N.Y.) J. Broderick

APPENDIX "B"

PROFFER

(THOMAS T. ANDERSON)

PROFFER:

Comes now counsel for depositors and submits the following as a proffer of proof. If Mr. Thomas T. Anderson were called as a witness for the petitioners, he would testify as follows:

1. That the attached is his Curriculum Vitae and that it is true and correct.

2. That he has represented many plaintiffs and has secured may verdicts and settlements in excess of $1,000,000, and is familiar with the factors that are used to determine a reasonable fee in contingent fee cases.

3. Based on the hypothetical question asked, it is his opinion that a reasonable fee would be $11 million or 25% of $44 million. At the outside 25% of $29 million would be $7.25 million and that would be reasonable if there is to be an additional recovery of fees from other sources or other defendants.

4. In his opinion, $5.8 million or 20% of $29 million is inadequate, but from the standpoint of everyone but the lawyers could not be considered unreasonable.

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MICHAEL T PIERSON
MEDICAL ANALYST/OFFICE MGR
LOWELL SOMERS M D F A A F P

THOMAS T. ANDERSON

Curriculum Vitae

1. Member, The Inner Circle of Advocates, 1985-present. Limited to top 100 personal injury attorneys in the United States.

2. Member, International Academy of Trial Lawyers, 1989-present.

3. Selected by "Town & Country Magazine," June 1985, as 1 of 84 Best General Trial Lawyers in America.

4. Selected in the 1989 edition of "The Best Lawyers in America" the best personal injury attorney in Riverside County, California. This conclusion based upon a survey of lawyers who were asked to select the best lawyers in their county.

5. President, California Trial Lawyers Association, 1970-1971.

6. Judicial Council, State of California, 1978 and 1979.

7. Vice President, California Trial Lawyers Association, 1966-1969.

8. Member, Board of Governors, Association of Trial Lawyers of America, 1971-1977.

9. Executive Committee, Association of Trial Lawyers of America, 1973-1976.

10. Co-author, Association of Trial Lawyers of America Basic Advocacy Manual, 1968.

11. Member, Board of Governors, California Trial Lawyers Association, 1968-1977.

12. President, Desert Bar Association, 1963-64 and 1964-65.

13. Member, Board of Trustees, Desert Bar Association, 1957-1968

14. Member, Board of Governors, Western Trial Lawyers Association, 1964-1970.

15. Trustee, Attorneys Congressional Campaign Trust, 1975-1978.

16. Member of California Bar Association, Association of Trial Lawyers of America, California Trial Lawyers Association, Western Trial Lawyers Association, Desert Bar Association, and International Society of Barristers, Trial Lawyers for Public Justice (TLPJ), National Board of Trial Advocacy.

17. Public office, Board of Trustees, Palm Springs Boys' Club, 1973-1978, and Board of Trustees, Palm Valley School, 1962-1977.

18. Accepted Jesus Christ as personal saviour on September 5, 1976. Since that date has been a member of the Board of Trustees, Youth for Christ; Board of Governors, Institute for Creation Research; Board of Trustees, Ariel Ministries; Board of Directors, Julian Center; co-counsel and Assistant Attorney General for the State of Louisiana in Keith v. Board of Education, wherein declaration is being sought for the constitutionality and enforcement of a statute requiring teaching of Creation Science if Evolution Science is taught in the public schools of Louisiana; lectured to various groups, including attorneys, on the subject matter of the evidence supporting the deity of Christ.

19. Education: B.B.A. degree, University of Oregon, 1949; B.S. degree, Willamette University, Salem, Oregon; two years of Law School at Willamette University; and received L.L.B. degree from University of San Francisco, 1955.

cv/dlr

HYPOTHETICAL QUESTION

Mr. Anderson:

I intend to ask your opinion as to what would be a fair fee for plaintiff's counsel in this pending case. As a basis for your opinion, I want you to assume the following facts to be true.

1. For many years prior to July of 1986, the State of Utah had a privately insured thrift & loan industry. The industry consisted of depository institutions chartered as industrial loan corporations, commonly known as thrift & loan companies or "thrifts." Deposits in the thrift & loan companies were to be guaranteed to a statutory limit of $15,000.00 per account by a legislatively created private guarantee corporation. The guarantee corporation, however, was grossly undercapitalized from its inception. Healthy thrifts fled to the safety of FDIC or FSLIC coverage. Five less healthy thrifts could not qualify for federal deposit insurance and remained with the guarantee corporation which I will designate by its acronym ILGC.

2. I want you to assume that in 1985 and 1986, these five thrift institutions were in grave financial difficulty and their impaired condition was known to state officials and to the state commissioner of financial institutions. The state was working toward finding a solution for the problems. During that time that the State of Utah knew that the ILGC (Industrial Loan Guarantee Corporation) was insolvent and unable to guarantee the deposits, but nevertheless, failed to tell the depositors of that circumstance on the theory that it could find an equitable solution that would be more advantageous to the depositors than allowing the ILGC and the thrift institutions themselves to fail.

3. Not finding a satisfactory solution such as a take-over or buy-out, the State of Utah, on July 31, 1986, closed said thrift institutions and put ILGC into receivership at which time the losses to the depositors were estimated to be in the neighborhood of $106,000,000 principal. Of the $106,000,000, at that time it was

estimated that $31,000,000 could be recovered by fast liquidation, that $41,000,000 was liquid, and that there would be about a $44,000,000 shortfall.

4. The $106,000,000 in lost deposits represented approximately 17,000 accounts held by approximately 9,000 depositors. Certain depositors formed a committee to act on behalf of all depositors to seek redress from the State of Utah and its Department of Financial Institutions. When those efforts failed, the committee chose to seek redress in a court of law on behalf of the depositor class. The depositor committee conducted nationwide interviews to find counsel to represent the class. The committee finally chose class counsel from over 50 firms. The firms selected were Misuraca, Beyers, Costin, Case & Provencher and Haley & Stolebarger. The principal lawyers involved were Malcolm Misuraca and Doug Provencher of Misuraca, Beyers, Costin, Case & Provencher and George Haley of Haley & Stolebarger.

[redacted] The depositor committee, as representative of the class, and class counsel signed a written contingent fee agreement prior to commencement of the action. The contingent fee agreement provided that class counsel should be awarded a fee of between 20 and 40 percent of amounts recovered. The depositor committees insisted the case be taken on a contingent fee basis or not at all.

6. In response to an invitation from the committee, approximately 80% of the class members (100% of the class members responding) expressly authorized class counsel to present claims on their behalf and ratified the engagement of class counsel on a contingent fee basis.

7. To bring the case class counsel was first required to successfully achieve a declaratory judgment on the following issues:

a. Whether notices of claims under the Utah Governmental Immunity Act could be filed on behalf of a class of persons rather than individually. This was

an issue of first impression in the State of Utah with a split of authority in surrounding states.

b. Whether the limitations date barring claims under the Utah Governmental Act could be extended on equitable grounds. The grounds were the State of Utah's misleading assurances that the State would satisfy the claims in spite of the claimant's non-compliance with the Governmental Immunity Act. In fact, the State's true intentions came to light the time in which to bring the claims had run.

8. After successfully litigation those procedural hurdles, class counsel filed a comprehensive complaint for damages and other relief. The complaint named 60 defendants and 300 Doe defendants specified in the complaint by category. Included among the named defendants were the State of Utah, the Department of Financial Institutions and its past and present officers, a prestigious Salt Lake City law firm, other thrift & loan institutions, and representatives of thrift & loan institutions who had served as trustees of the failed guarantee company which was to have guaranteed thrift deposits. The thrift & loan institutions and their representatives named as defendants consisted of a significant portion of power and wealth in the State of Utah. The complaint included the following claims:

a. Common law deceit or fraud;

b. Other species of fraud;

c. Statutory fraud such as fraudulent conveyances;

d. Per se liability for the breach of criminal statutes including the felony of receiving deposits into an insolvent financial institution;

e. Breach of duty;

f. Violations of securities laws;

g. Constitutional violations;

h. Breach of express, implied and constructive contracts;

i. Negligence;

j. Other torts;

k. Civil conspiracy;

l. Violations of the federal Racketeering Influenced and Corrupt Organizations Act; and

m. Violations of the Utah Racketeering Influenced and Corrupt Enterprise Act and its successor the Utah Pattern of Unlawful Activity Act.

9. The named defendants hired the prestigious big name counsel in Utah to defend them. They responded with a barrage of motions to dismiss, motions for a more definite statement and motions to strike. Class counsel performed extensive discovery, formal and otherwise, and extensive research to establish the liability of the State and the other defendants. Oral argument on the motions lasted an entire day. The court took the motions under advisement and the motions were still pending when settlement was later reached.

10. Class counsel also sought a legislative solution at the same time they were prosecuting the civil action. Class counsel attempted to recover the depositors' lost saving through means of legislation before the Utah Legislature which would have created a new bank with State backing comprised of the remaining assets of the failed thrifts. The legislative measure required extensive research and negotiation. The measure failed to pass in the general session, but that effort led to the enactment of legislation creating a task force to examine the failed thrift crisis and to evaluate whether or not the State of Utah was liable to the depositors.

11. Class counsel appeared before the task force and revealed for the first time damaging evidence against the State of Utah. At the request of the task force's counsel, class counsel briefed a number of issues including:

a. the State's liability to the depositors;

b. the State's insurance coverage for its liability to the depositors;

c. the inapplicability of a $15,000 per account statutory limitation on deposit guarantees claimed as a defense by the State, and

d. claims against defendants other than the State of Utah.

12. Class counsel then negotiated over a period of several months a settlement with the Governor of the State of Utah and the State's insurer which provided a recovery to the class of approximately $44 million. Once approved by the Governor the settlement had to be enacted by enabling legislation in special session by the Utah Legislature which had already refused to provide relief to the thrift depositors in the general session. The Legislature finally passed the settlement bill after a month of negotiation with class counsel and four meetings of the special session. Once approved by the Utah legislature the settlement had to be approved by the class action court in which the class action was pending. Once approved by the court the settlement had to be approved by a majority of the class on individual notice to each class member.

13. Of the settlement funds, $15 million of the $44 million settlement is a nonrecourse, interest free advance from the State of Utah to the depositors on the proceeds of future liquidation of the thrift assets. The proceeds of future liquidation, if any, will be divided between the depositors and the State until the advance is repaid. Although class counsels' contingent fee contract allowed for a fee on the entire $44 million recovery, class counsel sought no fee with respect to the $15 million advance from the State. Class counsel claimed a fee only with respect to the $29 million portion.

14. Of the $29 million, the State contributed $10 million and the State's insurers contributed $19 million. The State's own counsel had advised the State it had at most only $1 million in coverage. Class counsel was able to convince the State and

its insurers of the State's extensive risk in spite of its limited coverage, which ultimately resulted in the State's insurers tendering $19 million toward settlement.

15. The time spent by class counsel up to the time of the settlement, if charged at their normal hourly rates, would yield a charge of approximately $1.8 million. Class counsel have additionally spent thousands of hours implementing the settlement.

16. Class counsel is in the process of filing a new amended complaint against remaining defendants including four Big Eight accounting firms, several smaller accounting firms, officers and directors of the failed thrifts, and the law firm previously named as a defendant. A new survey of the class revealed that 94.4% of the class desires class counsel to proceed to prosecute the remaining claims. The class committee and representative plaintiffs recognize the importance of maintaining a professional relationship with class counsel and the importance of preserving the contractual rights and obligations under the contingency fee agreement to insure that the case will continue against the remaining defendants on the agreed upon terms. Accordingly, they have repeatedly stated orally and in writing that class counsel should receive a reasonable fee from the settlement proceeds and that the contingent fee agreement should be honored.

17. Costs of approximately $1.0 million were incurred, approximately $800,000 of which was for expert fees. A large portion of class counsel's out-of-pocket expenses were paid as incurred by the class. A balance of approximately $650,000 of the costs remains unpaid and for which class counsel is obligated.

18. The class consists of approximately 9,000 persons, holding approximately 17,000 accounts in the failed thrifts.

19. The court made a preliminary ruling that it would authorize a fee of $5.8 million or 20% of the $29 million recovery. There appears to be no significant or

meaningful dissatisfaction by the depositors to that amount. No one has raised a protest or entered an objection.

Based on the above facts which I have asked you to assume, do you have an opinion regarding what would be a reasonable fee for counsel representing the depositors?